JURISTIC PERSONALITY OF HINDU DEITIES

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[Asutosh Mookerjee Lectures, 1931]

BY

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" Willst du dich am Ganzen erquicken,
So muszt du das Ganze im Kleinsten erblicken."

—Goethe

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FOREWORD

In the autumn of 1931 the Asutosh Mookerjee Lecture Committee appointed by the Governing Body of the University Law College asked me to deliver three lectures on the Juristic Personality of Hindu Deities. I am grateful to the members of the Committee for the opportunity they gave me of making the views of Sir Asutosh himself on the subject known to the general public. The theme of juristic personality is a topic that I have been studying for several years past in its historical and analytical aspects; in the year 1915 I sketched the important theories briefly in my Tagore Law Lectures on the Principles of the Law of Corporations. On the present occasion I have borrowed from my lectures of 1915 some portions bearing on the problem of juristic personality, but the borrowing is *not a verbatim reproduction* of the old lectures, the theories have been succinctly presented just to point out that the position of Sir Asutosh appears to me unassailable.

In conclusion I must thank some of my legal friends who have helped me in various ways; special mention must be made of Sastri Haricharan Ganguly, M.A., B.L., Advocate, Calcutta High Court, sometime Professor of Law, University

Law College, Profs. J. P. Sarbadhicary, M.A., B.L., and A. C. Guha, M.A., B.L., Advocates, Calcutta High Court. Professor Guha directed my attention to the German authorities on the Vedic literature quoted in the lectures ; he has read the proofs of the Sanskrit portion of the third lecture and I am sure that his knowledge of Sanskrit has made this portion quite free from any error. I am also obliged to Mr. Brajendranath Pal, B.L., Assistant Librarian, University Law College Library, for the arduous work of correcting the proofs and seeing the type-script through the press.

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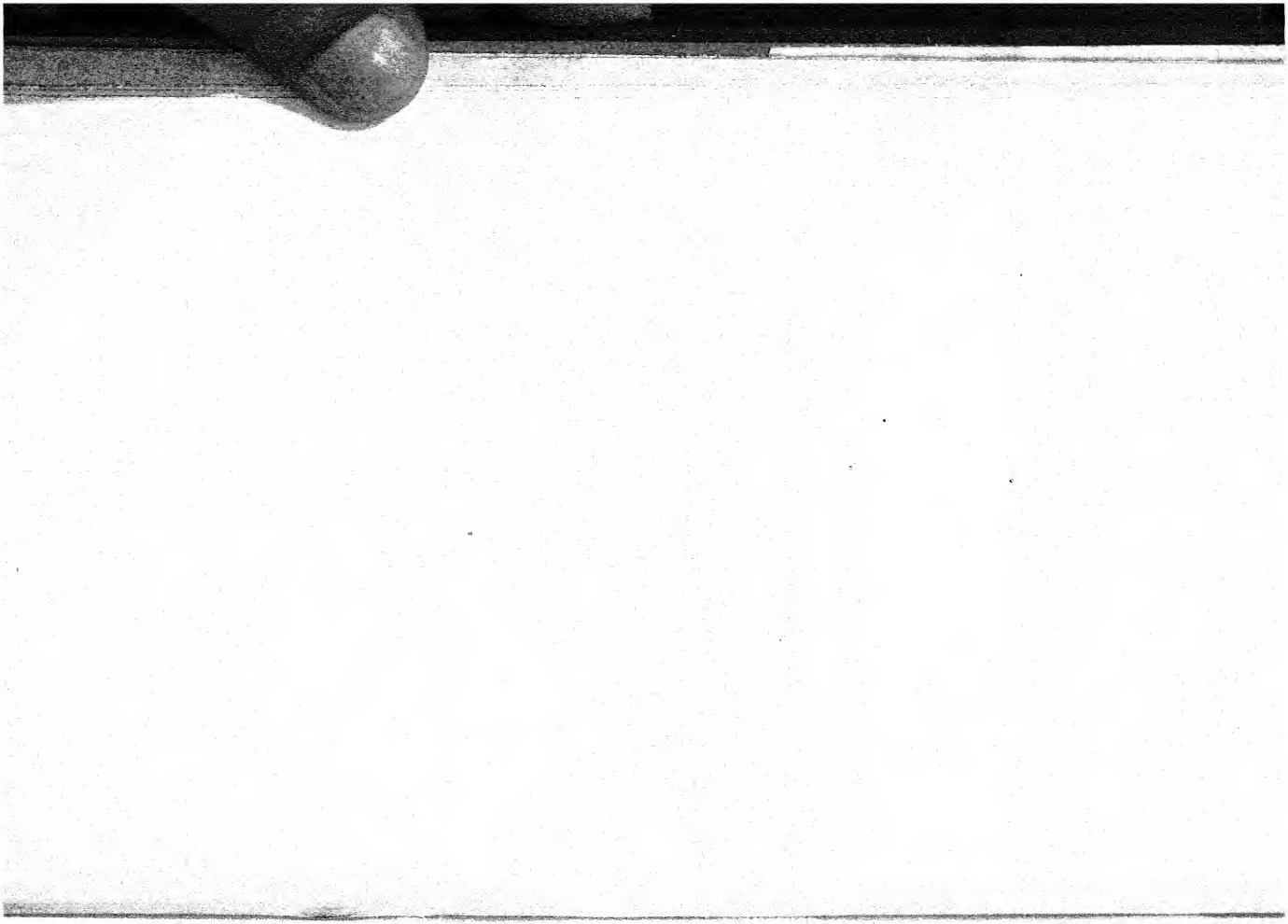
CONTENTS.



JURISTIC PERSONALITY OF HINDU DEITIES

LECTURE I

The Problem of Juristic Personality

Personality in general.

The terms person and personality are inseparable :—the first indicates an entity, the second, a peculiarity of that entity. Both can be used conjointly because the general formula runs : no person no personality and no personality no person. All the same, it must be borne in mind that the peculiarity known as personality does not exhaust the whole content of an entity, an entity has always other peculiarities besides personality. The salient fact is that personality is a concept depending on certain special circumstances. When personality is denied to an animal other than man it is because although a man is an animal, he has certain peculiarities not found in other animals. In its general sense personality is an attribute conditionally attached to an entity. The outstanding example of personality is a human being. The whole physical world inspite of its multiplicity and mutability of form is a thing in spatio-temporal universe. The changing form and conserving

quantity are (were ?) connected with the concept of matter. Man has a material part, but at the same time he is an organised material being. The organism has an essential feature, *viz.*, life. Speculative philosophy has laid special stress on the personality or self-consciousness of a human being. Self-consciousness is a faculty of man alone, consciousness he shares with other animals. This then, is the implication of personality in its general philosophical sense.

Juridical sense.

The word person bears a special meaning in law. It is derived from the original significance of *persona*—a mask; one mask may serve for various individuals destined to play the same rôle; one mark—*viz.*, personality, may collect together a group of legal attributes singling out an entity. In fact a person in Gierke's famous definition, is a right-and-duty-bearing entity. Juristic person or legal person has a still more limited sense—it means a right-and-duty-bearing entity other than an individual human being. This negative definition will be our starting point. In its generality it points to a significant fact that in human society distinct rights and duties are attributed not only to physical beings but to certain groups, associations, sometimes to certain ideal entities apart from any groups. In its general sense as I have just mentioned the word person is limited to a human being. In the language of philosophy its sense

varies according to the school that uses the term, some denying that there is such an entity as a person, while the spiritualistic school adopting the general sense of person admits the personality of a human being alone. Unfortunately some jurists imitating the philosophers have brought confusion into the legal domain. The topic of juristic personality has caused needless trouble due to the forgetfulness of the fact that law is not philosophy and legal terms register legal facts. I shall try to show in course of these lectures that a clear notion of juristic personality removes all the paradoxes put forward by theorists. In law, I repeat, a person is a right-and-duty-bearing entity. Nothing more, nothing less. To know whether an entity is a person or not all that is required is to ask what subjective rights are to be attributed to it. Indirectly the philosophical notion may influence the juridical notion but they are nowise identical. In the last lecture it will be shown that personality in law may be complete or incomplete. The disregard of this fact has led to erroneous conclusions regarding the juristic nature of Hindu deities.

Technical nature of the study.

The study of juristic personality is of technical nature. By this I mean, it is concerned with the analysis of an abstract juridical concept in order to find out to what phenomena of jural life it should be applied. In other words, it is an

intensive study of the distinction between real rights and personal rights in order to make an extensive use of the results of this study. From the mode of conceiving the notion will follow consequences in the juridical world. The definition and its consequences form the juridical constructs. If the notion of the subject of law be wide enough to include state, municipality, associations, endowments, deities the technical apparatus must allow these to live, move and have their being in jural domain. M. Geny has well said in his Methode d'interpretation du droit, "the danger lies in regarding purely subjective and provisional ideals as permanent objective realities, and the attempt to bring under certain inflexible *a priori* rules and categories the whole system of positive law renders the confusion worse confounded." No better example of this abuse of juridical notion can be supplied than the attempt to transform the Hindu deity into a complete corporation sole.

The notions being defined the consequences will have nothing of arbitrariness in them ; they will be the logical imperatives. To take a concrete instance : A subjective right being defined as a power attributed to a subjective volition it will be impossible to admit the existence of a subjectless real right divorced from the existence of an individual intention. The definition and its consequences, in other words, the juridical constructs being assured, the whole system of the

juridical phenomena will appear as necessary adjuncts. So our theory will not be an absolutistic theory of personality but an evolutionistic study justified by the juridical constructs already adopted.

These preliminaries being supposed let us proceed to our study. The legal personality of a man has a twofold aspect—his legal capacity and his actual capacity. In Roman Law as in Hindu Law instances are frequent where individuals are physically capable but legally incapable. Again instances may be quoted where the entity is legally capable but not so physically —a *fiscus* in Roman Law and the *koshagar* in Hindu Law are examples in point. In defining personality its dual aspect must be borne in mind. In Germany a naive procedure to define personality as the attribute of life alone has miserably failed. In German law all men are legally capable, hence the statement that all men are persons has led some to think that life is the determining factor of personality. When asked if all living beings are persons why is personality denied to animals, they reply: with regard to life we must distinguish between a narrow and a wide concept of the value of life. In the wide sense all living beings have the same value. Each normally constituted human being feels pleasure and pain, so does an animal. But the value of an animal's life is surely lower than that of a man. Hence

The dual significance of person.

the higher value would entitle a human being to be a person, while the animal is kept out of the class of persons. The problem of juristic personality however is not so simple as to be solved by reference to the question of value alone. The dual aspect of personality can never be lost sight of. A brief history of the problem of juristic personality will make the point clear.

The pre-history of the problem.

Properly speaking the problem of juristic personality is a problem of the past century. The older jurisprudence dealt with the question but in a different spirit. The Roman sources indicate that juristic persons were known to Roman law, the Glossators discussed the question and from their time onwards the question has been taken up on and off. Even we may say that the theory of juristic personality of the first half of the 19th century goes back to the dogmatists of the Roman and Canon law. Nevertheless his problem may be called a problem of the 19th century, because as already remarked, the ancients studied the subject, however intensively, from a different standpoint. The Glossators, the children of the Romanists who dealt with the law of juristic persons as distinguished from the theory of juristic personality—were confronted with this problem in connexion with the law of associations in ancient Rome. But the Roman sources do not present this problem in modern form. Thus when the

question is asked how far is a *universitas* identical with the sum of the individual members, or the *actor* of the *universitas*, an *actor singulorum*, etc., it is discussed from the practical standpoint of positive law as distinguished from the theory of the essence of a *universitas*. When a Roman jurist laid down "*hereditas personam defuncti sustinet*" or "*quod universitati debetur, singulis non debetur*," he was merely inviting discussion, not expounding a theory. The Romanists were collecting facts, the Glossators were busy discussing their bearing on living issues. The generation following the Glossators saw further development, but even then a true theory of juristic personality was far to seek. The time was not yet ripe. The period in question was the period of development of the law relating to ecclesiastical foundations and community, the practical aspect of the law claiming attention throughout. Directly the difficulty of bringing the ecclesiastical phenomena in line with the Glossatorial theory was felt, a new theory had to be devised. So the development of the law of ecclesiastical foundation went hand in hand with the development of a theory of canonistic corporations. The subject of rights as a person in law as distinguished from the human being appeared. The *universitas* became an *individuum*. Innocent IV called it a fictitious person, Johannes Aundreae said it was a real person. The canonists may, then properly, be

called the spiritual fathers of modern corporation problem, and Gierke is of the same opinion. According to him " It was Innocent's genius that re-discovered the notional, fictitious being that lurked behind the semi-vocal Romanistic doctrine of the *universitas*." Surely the juristic person, in theory and doctrine, was now a *persona ficta*. But it must not be supposed that the canonists looked at the problem with the eyes of a Savigny. In fact the modern fictionist looks at the formal side of the problem, while the canonist cared only for the practical issues. The all too important task of the Canon law was to determine whether a *universitas* has delictal capacity, whether it could be excommunicated for spiritual delinquency. Innocent in his characteristic way answers in the negative, because a corporation is a lifeless notional being, a " *nomen juris et non personarum, a nomen intellectuale et res incorporalis* " and consequently incapable of willing and acting unless through its members. Johannes Aundreae, following a parallel route, defines personality as *rei rationabilis individua substantia* because only such a being with body, will and self-consciousness has sacramental capacity and can be the object of spiritual and temporal punishment while the *universitas* is an abstraction, devoid of life and soul and consequently cannot be touched by ecclesiastical laws. An evident conclusion from this juridical construct is that a *universitas* as

against its members has legal capacity but it is physically incapable and must act through agents. This doctrine of physical incapacity renders the *universitas* incapable of willing also and so the rule about the choice of a *syndicus* of a corporation illustrates the logical consequence of the separation of the two spheres of right. The canonistic theory was still incomplete in that it led to uncertain results when applied to practical problems ; *e.g.*, in theory a corporation could not be punished but in practice the members were liable for a corporative crime or tort ; so the fiction theory was robbed of its full benefit.

The legists also looked to the practical side of the problem. They stuck fast to the fiction and representative theory out of practical considerations. The post-Glossators, however, had a difficult problem before them : To determine the successional capacity of a *universitas*. The *universitas* was regarded as distinct from its members, the continuity of the *universitas* had therefore no connexion with the continuity of its members and the fiction theory pointed to contradictory conclusions. The theory of Innocent was caricatured into a bizarre doctrine to justify the established custom. They said " a legal person, although notional, can have a *mens rea*, can be punished ; can have an intention and can be an heir." A striking illustration of Holmes' saying " Life of law is not logic but experience."

The change in the view-point took place under the regime of Natural law. Outwardly the doctrine of *persona ficta* remained unchanged but its inner content became fossilised ; it lost its vitality. The Natural law poured into the dead form a new life. It retained the name of fictitious person but gave a new interpretation to this old phrase, *viz.*, the fictitious person was assimilated to the collective group, the group-person. The juristic personality lost every trace of mysticism and appeared as a perfect legal construct, just like the legal personality of individual men which depends on their capacity to play a jural rôle because subjective rights are the outcome of their power of willing. This power (willensmacht) is conceptually of factual nature, it is not identical with psychological volitional capacity and consequently a person in law need not satisfy the psychological definition of a subject willing and acting. On the other hand the subject of a right should have capacity to perform juristic acts—an essential point, in fact the only point, to be stressed in the theory of legal personality. But the majority of jurists of the 19th century discuss the problem of juristic personality starting from the so-called axiom "men are real persons in law." Let me consider their position.

France and the theory of legal persons.

The system growing out of the notion that men only are true legal persons was generally adopted in France

towards the end of the 19th century ; this system came to be known as the fiction system. Man is the only real person, therefore the juridical personality of other entities is fictitious. The legislator, for social reasons, regards these fictitious persons as indistinguishable from real persons. These fictitious persons, for social purposes, are ruled by the general law. It follows then that the State is the absolute master of the fiction adopted. Juristic personality in this view does not correspond to reality. It is a favour allowed to certain groups judged worthy of the favour. Undoubtedly this favour may be meted out in diverse forms : the legislator may reserve the right to examine each particular case just to ascertain whether the favour should be allowed ; he may delegate the right to some administrative authority, he may allow it, in advance, to all the establishments conforming to a special type, provided that they are amenable to certain legal rules. But personality in all these cases being a matter of favour becomes wholly arbitrary. No group, however lawful, may claim it as a natural right, it is a matter of grace and may be withdrawn at any moment. In general the State will grant it to groups that are serviceable and will refuse it to others. Juristic personality, so conceived, stands apart from the right of association, it will be an attribute of some *associations* only. On the other hand it will be independent of the

group that had obtained the special favour. So again, in this view, juristic personality will be absolutely distinct from the personality of the members composing the group. It may subsist, as Savigny has it, even when the group has disappeared completely, and the intention of the members will not cause its death. I shall limit myself to the discussion of this general view of the fiction system.

First objection.

The principal objection to this view is that it does not solve the problem put forward. The object of a legal construct is to supply a machinery competent to deal with the subjects of rights in whatsoever forms they appear. The fiction may serve to simplify the application of certain juridical theories, but by itself it does nothing. Take for instance the fund of an incorporated company. Who is the owner of the fund? The fiction system must admit that an imaginary person owns the fund, practically the fund will be *res nullius*; this is patently absurd. The authors of the fiction system conscious of this *impasse* have been constrained to give the fiction a go-by, at least temporarily, and to declare that on an occasion like this it is necessary to go behind the fiction, to find out the entity hidden by the veil. But behind the veil there is mere emptiness because the preconceived idea that men only are real persons will not suffer any other entity to enter the arena of personality.

The fiction system in its extreme form is then untenable, because no legal system can conceive a bundle of rights and duties floating in the air. Practical necessity demands, and law is nothing if not practical, that wherever there is an object, be it material or immaterial, there must be a subject. So ownerless patrimony is seized by a non-human legal person reminding one of the Roman maxims *personæ vice fungitur.*

Second objection.

A second objection may be based on the impossibility of applying the fiction system to public law. The notion of personality was developed in Roman law, in the domain of private law. The Roman jurisconsults never called the State a person; for them a person was a figure of private law, owning property, having familial rights. The State was above the persons of private law and although a later period assimilated the *fiscus* to a person, the person here was the subject of private rights. The notion of juristic personality that cannot suffer the State to be a person is singularly incomplete, and it was this mistaken view that led to the futile attempt during the French Revolution at separating the patrimony of the princes from the patrimony of the State. The notion of personality must embrace the public and the private law.

A third objection may be raised against the fiction system. It misapprehends the rôle of the legislature in social relations. By itself the

legislature creates nothing. The existence of the facts on which the social relations depend is independent of legislative authority. The legislator considers certain relations as lawful, others as illicit. The theory of personality which makes the legislator the creator of personality, sitting apart, puts, in a homely phrase, the cart before the horse. Personality as the result of jural analysis is not a creature of legislative imagination, the legal person cannot be dubbed any more fictitious than a contract springing out of certain provisions of law.

Germany and juristic personality.

Before I come to a detailed examination of the legal personality of human beings let me review the ideas of German jurists briefly. This is all the more pertinent because the French jurists of the latter half of the 19th century harked back to Savigny. In my second lecture I shall take up the theories of juristic personality in more detail, in the present lecture I am tracing the evolution of ideas that led to the formulation of the problem. Savigny, as Windscheid says, may be regarded as the father of the modern problem of juristic personality. His work signifies not only the romanistic reaction against the natural-law doctrine of collective personality, but also an attempt to lead the doctrine of personality to a general view-point in order to explain the particular phenomena as natural consequences. To

him the whole problem turns on the relationship between the subject and object of a right, and at times between the subject of rights. "Each legal relation is a relation between one individual and another. The essential constituent of that relation is the nature of the individuals mutually related. Here the question crops up: Who can be the bearer or subject of a jural relation? This question is a question of legal capacity." Thus formulated the problem has dominated juristic ideas for nearly a century. And not only by formulating the problem, but also by his method of attacking it Savigny has rendered signal service to jurisprudence.

"All rights are intended to ensure habitual freedom to men in a society." This proposition, often misunderstood, has an important place in Savigny's view. Because he maintains, "Therefore the original concept of person or of a subject of rights must coincide with the concept of man" and this original identity may be expressed by the formula "only an individual man has jural capacity." This apparently naive statement leads to important considerations. We are accustomed to regard Savigny as the great historian of Roman law, the discoverer of Gaius, the principal leader of the historical school of jurisprudence. Savigny was all that and more, behind the historian stood the philosopher. It was the individualistic philosophy of Savigny that moulded the familiar fiction

theory and the historico-philosophical method of Savigny became the method of the early 19th century.

The philosophical bent of Savigny is apparent in the ethico-philosophical theory of juristic personality borrowed from the philosophers of the epoch. For Kant personality is freedom from and independence of the mechanism of nature, for Fichte it is a peculiarity of the conscious spirit represented in a totality standing as a free self, for Hegel it is the generality of the autonomous will. So Kant sees in every person a presence of will capable of representing causality through the principle of pure reason, Fichte on the other hand would view a person as capable of conscious activity and Hegel equates personality to intelligence, to a practical and spiritual presence. The whole trend of ethical thought is consequently individualistic and the theory of law of the period is also individualistic in essence. So for Kant, Law is the totality of conditions under which the free-choice (willkur) of one man coincides with the free choice of another according to a general rule of freedom, for Fichte the notion of right is equivalent to the notion of reason, and legal relationship is based on the concept of a self-conscious individual, for Hegel right is the actualisation of freedom in society. It may be remarked in passing that the Hegelian concept of State as a self-conscious moral substance based on his definition

of right bears the germ of Savigny's theory of juristic personality. The individualistic ethical standpoint is the standpoint of Savigny.

The theory of Savigny rests on the doctrine of jural relationship; every particular right is only an abstraction, a selected aspect of the totality, it appears as borne by an entity that makes its dominating will felt in a given sphere of action. Hence in Savigny's system "Right is connected with conditions that bring about a contact of a man with his equals by nature and limitation." From this notion of right it follows as a natural conclusion that every jural relationship between individuals must be determined by a legal rule. This determination is conditioned by the fact that to an individual will is granted a domain where it can act independently of any 'constraint.' So the essence of jural relationship lies 'in the region of independent suzerainty of individual will.' In other words the essence of jural relationship is the conservation of personality in the above noted individualistic, ethical sense. Freedom of will is the salient factor, the preservation of this freedom by a guarantee of legal power is the essence of law; consequently a man alone can be a subject of a right, since a right is a feature of the ethical personality of man. So juristic personality must coincide with ethical personality, for the exercise of a right means the assertion of personality, the assertion of individual will in the ethical sense.

From this standpoint the concept of a juristic person as a notional subject of rights is inevitable. A man as a bearer of ethical personality is a real subject of rights, but as there are other juristic persons known to law Savigny says, "However, the original notion of personality has undergone a double variation in positive law—a contraction and an expansion. In many instances men have been denied personality partly or wholly while sometimes personality has been conferred on entities other than individual human beings." We need not discuss here wherein the error of Savigny lies. His error has been the error of a century of jurisprudence before the time of Gierke. The fiction system of Savigny dominated the French jurists during the French Revolution and Puchta and Windscheid in Germany welcomed the doctrine as the only rational one that served to solve many a knotty problem of jurisprudence. Puchta takes the ethical personality of man as his starting point. "When we consider the jural position of man in society, we attribute to him a possibility of willing, we abstract from him his other individual peculiarities and consider only the power of his will. Men as persons are subjects with this potentiality of will. Personality is, therefore, the subjective power of a jural will. Law has also recognised other ideal persons, but these are notional persons, and may be called juristic or fictitious persons."

Windscheid, a disciple of Savigny, is essentially of the same opinion. "Right is a power of the will subsisting in the subject of the right. The question who may be the subject of a right contains its own answer: man. But it is frequently found in positive law that certain subjects of rights are not human beings. In such cases the subject of rights is a matter of determination. Law is compelled then to represent a notional being as a person. Such a person is qualified by the epithet juristic."

The fiction system evidently failed to satisfy the practical lawyer. Legal facts called for a better co-ordination and it was Gierke who led the reactionist school. His notion of personality of men coincides with that of his forerunners, but the concept of group-personality threw new light on the whole problem. Savigny and Windscheid concentrated attention on the abstract conceptual process. Gierke works in the concrete. "We must represent the juristic person and not merely think him"—"*Wir uns die furistioche person nicht nur deuken, sondern auch forestellen.*"

Gierke has pointed out that the problem of juristic personality can only be solved by reference to the group-persons. The State and other aggregates of men present phenomena with a common characteristic which can be subsumed under a class-concept, *viz.*, organism. Now the question is: Is this concept really applicable to individual

men and the group of men in the same sense? Since the concept of organism was originally derived from abstraction from individual living being, the theory of Gierke was compelled to equalise the group-organism with individual organism. This equalisation, although of ancient date, has nevertheless failed to present a unique solution. Gierke has perforce made a further assertion about group-body and group-mind. The group as a person can be singled out from the individuals forming the group because law has admitted the existence of a group-body and a group-mind. Over against the individual person with individual mind stands the "gesammt-person" with a "gesammt-wille." This is the representation that makes a juristic person a real person. In the next lecture, when discussing the theories of juristic personality I shall take up the matter again. Let me conclude the present survey with certain general considerations regarding different classes of juristic persons.

Man as a juristic person.

I have already mentioned that the juristic personality of man is not conceptually conditioned or given by his ethical personality. In jural relationship man is only a subject of rights—he is legally capable. The content of the subjective right demands a physical ability to perform juristic acts and consequently a power of willing (willensmacht). This volition is of factual order and does not

coincide, as already pointed out, with the psychological capacity of willing and acting and as a matter of fact does not presuppose a subject willing in the psychological sense. On the other hand the capacity of functioning in the juristic world points to a separate region of activity. When the juristic co-ordination attributes jural capacity to an entity, the entity becomes a person because it is tacitly assumed that the factual capacity is an inevitable concomitant of the jural capacity. *Handlungs-fahigkeit* is a necessary preliminary to *Rechtsfahigkeit.* This is the juristic standpoint of personality and in considering whether a particular entity is a person in law, it must be always borne in mind that although jural capacity is not physical capacity, yet the former runs parallel to the latter because any limitation affects both the capacities similarly. To determine the jural capacity of an entity we ask: (*a*) Can the entity have a jural content? (*b*) Can it perform the jural act required of it? In the case of a natural person, the will and act connected with a jural transaction, are psychological terms, and therefore here psychological personality and juristic personality coincide in so far as the jural capacity and actual capacity coincide. But the juristic personality is not conditioned by the psychological personality as is shown by the case of group-persons functioning as juristic persons without possessing a will in the psychological sense, the

individual psychological wills form a totality of juristic intention in the eye of law.

The legal personality of man is not then absolute, it is relative, a man is more or less juridically capable. This relativity of legal capacity is an order of the social world. "All men exist in a double sphere—individual and social; their spiritual and physical lives form a totality that is influenced by social conditions." A man is more of a person, the greater the independence of his will recognised by law. The jural necessity of apportioning personality in a greater or lesser measure to entities like men according as they are more or less capable of rising above their individual lives is the basic ground of social stability.

Among the authors who try to demonstrate the reality of juristic persons, basing their conclusion on the presence of Will there are some, notably Zitelmann, who would not assimilate the social groups to biological organisms. The Willenstheorie is practically idealistic. It talks of an organic unity, but in the sense that diverse parts unite into a whole. This is called the principle of unity in the plurality. An aggregate of individuals becomes a new being from the moment of organisation, although the aggregate has qualities common to the individuals. This rule may be put symbolically : If A and B unite purely and simply, they do not form a new

individual, their union simply gives A+B. But if A and B form a third entity C, different from both, the force of organic unity operates to give C, qualities of A and B. The third entity is not a fiction, it is as real as the two others, the formula A+B=C is opposed to A+B=(A+B).

This idea of Zitelmann applies to all orders of knowledge. In the physical domain you have human body which is something else than a certain quantity of oxygen, hydrogen, nitrogen, etc., and a certain quantity of bones, blood and flesh. There is a principle of unity resulting from that mysterious force called life. At the same time human body has the qualities of matter common to its constituent parts. Again the chemical compound is not a mere mixture of its elements ; here the unifying force is the chemical affinity. Similarly a work of art is something else than a mere collection of sounds or colours, the principle of unity is the aesthetic aim. So the existence, of juristic persons, either individual men, or collective groups, is explained by the presence of jural intention that clothes the entities with personality.

Group-persons.

The group as a person in law is not the same as the collection of men merely. It is a union of individual wills. Just as in the case of man, it is the juridical intention that makes him a person, so here the collective intention makes the *universitas* a person.

As has been remarked by Meurer, "For law the individual person has a superfluous physical existence," it is not his body that counts but it is his will. The individual wills grouped together are controlled by the unity of aim. The collectivity so united is a distinct jural being. As Maitland has put it, "If n men unite themselves in an organised body, jurisprudence, unless it wishes to pulverise the group, must see $n+1$ persons."

Classification.

This cursory view of the problem of juristic personality naturally leads to the position that a good classification of juristic persons is essential in order that a particular entity may be given its proper place in a juristic scheme. A broad division suggests two classes: Foundations and Corporations.

Foundations.

The word 'foundation' in its generic sense denotes a perpetual affectation of funds for a definite purpose. An endowment is a kind of 'foundation' but it may be a juristic person. An endowment may be created with the help of trustees, and there are charitable endowments governed by special acts which have settled, once for all, the difficulties of any juristic theories because the question of personality does not arise at all. When the intermediary chosen by a founder is a human being with plenary rights to carry out the wishes of the

founder, the process of creation solves all the difficulties ; sometimes the State or any other corporation is the manager of a foundation or an endowment, here some questions connected with juristic personality are involved, in the practical administration of the foundation and finally 'foundation' is established *sub modo*, the patrimony is then affected with an aim, and the object of the foundation is then a juristic person in a way. In fact most of the legislatures in modern times have admitted the possibility of endowing the charities with a quasi-personality. The question of juristic personality naturally arises in such connexions and Savigny has divided the juristic persons into corporations and foundations bearing in mind that endowed charities in many instances appear as right-and-duty-bearing entities that break the wall of trustees and appear before the law courts. But the distinction between a corporation and an endowment should be borne in mind ; otherwise false conclusions will result as unfortunately has been the case with Hindu deities.

The principal difference between a foundation and a corporation as a juristic person.

In a foundation the destinatory is the subject of the right protected by the law, the intention necessary for the actualisation of the right does not reside in the group of beneficiaries but in the administrator of the foundation, this intention is not absolutely free, it

is directed, in a sense, determined by the founder. In a corporation, on the other hand, interest and intention are united in the same entity. Following Gierke we may say that intention is "immanent in a corporation, it is transcendent in a foundation."

From this view the group of beneficiaries—the substratum of the foundation—form the principal element but not the unique element of it. The organism, as designed by the founder, constitutes also an important element, for it is destined to represent the group of the beneficiaries not in any way whatsoever, but conformably to the wishes of the benefactor. Thus in a Hindu religious endowment not only the human beneficiaries, the *Sebaits*, but also the deity are essential elements of the foundation. The intention of the founder is directed to the perpetuation of a charity connected with the name of the deity. How far the deity is a juristic person by himself will be studied in this light in the last lecture.

Let me terminate this somewhat superficial sketch of an intricate problem by remarking that the main topic of these lectures, the juristic personality of Hindu deities, can only be satisfactorily discussed from an evolutionary standpoint. Disparate dicta of different judges can only be reconciled in the light of the historic development of juridical notions regulating the domain we are

concerned with. Savigny and Gierke, Puchta and Windscheid, Jaimini and Raghunandan no less than Narada, Jajnavalkya must be pressed into service so that we can assert with one of the greatest jurists of modern India that—A Hindu deity is not a juristic person for all purposes.

LECTURE II

Theories of Juristic Personality

Content.

In the last lecture I gave a short account of the problem of juristic personality. In the present I shall briefly take up the theories of juristic personality just to find out how far the Hindu deities are juristic persons. I must state at the same time that it is hardly worth while to discuss all the ramifications of different theories, only the principal theories that have established positive results will be succinctly surveyed. These fall under three heads: (*a*) The system of fiction or the fictitious person theory; (*b*) The system of the negation of personality; (*c*) The system of the reality or the real-person theory.

Fiction Theory.

The fictitious person theory.—Savigny as I have already said may be called the father of the fiction system in the sense that he gave a precise meaning to the expression *persona ficta*; he constructed a theory and deduced the consequences flowing from the theory. According to him the problem of personality is concerned with a question of juridical capacity extended artificially to some fictitious beings and he adds, "They are called juristic

persons, that is to say, persons who exist only for juridical purpose." In other words certain ideal persons are admitted to the domain of law in order that legal effects may be attributed to them. These legal effects are really the things that matter, but they have been grouped about a common idea, and the idea of personality has been suggested as the legal construct. The juristic persons have an existence but the existence is purely jural. He opposes them to real persons who exist by themselves, in the sense that these latter are individuals whose individuality is coupled with their personality; law has only to recognise their personality, and not to create it. The juristic personality, on the other hand, is not outwardly manifested with explicit individualisation; law has to intervene in order to individualise it and to stabilise its conditional existence. This is Savigny's thesis reduced to its essential postulates.

Brinz-Bekker-Duguit Theory.

The second system is due mainly to Brinz, Bekker and Duguit. The system agrees in holding the principle that man alone is a typical person. Consequently either (1) one may consider the mass of rights and duties as belonging to no particular individual; or (2) one may consider them to belong to the units in a group. Brinz and Bekker have chosen the first course. Their theory may be termed the theory of

subjectless rights. Brinz says, "according to the Roman idea, the city is not a person, but it holds the place of a person." In other words in the Roman division of persons, there are neither juristic persons nor fictitious persons but only men, it is only in the Roman division of things that juristic persons in modern sense occur. But the Romans did not create a second category of persons, they are content in saying that certain things, although subject to a special kind of rights, are *res nullius*.

According to Brinz the notion of aim plays the principal part, in *Universitates* such as the State, the communes, the corporations, the foundations, the establishments *piæ causæ*. The current conception has personified this aim, the personification being attached to the more visible parts—the City, the Gods, the Corporation, the Temple, the Church, the Hospital, and the Fiscus, the reality is that the property here is ownerless.

Bekker has made this theory more subtle from the philosophical standpoint through the notion of the subject of rights. Two distinct situations are possible with regard to one and the same right —disposition and enjoyment. Disposition includes the right to conduct oneself as a master to defend the property in courts, to administer it; enjoyment is the right of appropriating the material benefits that the property produces.

These two situations are often separated, the first may appertain only to a being with volition, the second may appertain not only to human beings endowed with volitional powers but also to those incapable of willing such as the infant and the insane and even to animals and inanimate objects. One may dispose of property for the benefit of the latter, a condition regarding the administration of property so left being attached. Are these then subjects of rights? Bekker would say no. What is protected in such cases is the intention of the founder provided it does not run counter to current ethical ideas.

The common objection to this theory is that the notion of subjectless rights implies a contradiction in terms. Such an objection is evidently based on the definition of a right. But there is another objection independent of all definitions. If a subjectless right is premised what is there to prevent the State from doing what it likes with such rights? In such a regime the entity called a juristic person will have a precarious existence. The very object of law will be defeated, the juridical construct will be a mere mirage, no permanent deduction will be possible as to the nature of a corporation sole or a deity, or an establishment.

Duguit deals with the whole situation in a different way. He has denied the utility of the concept of juristic personality. According to him

it is inexact to think of the subjective rights as relations between two subjects. They are simply powers of the will, *willensmacht* admitted by law, subjective juridical situation, and not subjective rights, being the concern of the juridical construct. The notion of personality is then wholly useless.

Against Duguit it may be urged that the device proposed by him is insufficient. Take a concrete case. The State should not be called a jural person, the governor and the governed will do all that the jural person is supposed to do. The phenomena of juridical life are reduced to the acts of the individual will subordinated to a rule of law. Apparently such a process cannot meet all the requirements of a proper theory. For it will be difficult, following the lead of Duguit, to find out in many instances which particular physical person is the carrier of rights and duties in connexion with a contract between the State and a foundation. One is at a loss to determine the series of persons who may be considered as connected with a juristic act without having recourse to the idea of personality. The uselessness of the concept of juristic personality or the negation theory has been pushed to its extreme logical end by Michoud who thinks that "the personality of juristic persons is only apparent, a deeper analysis shows that it is a juridical artifice, a sort of scaffolding which may be put away on perceiving that at bottom all rights belong to individuals."

Objections.

The objections made to the fiction theory apply to the negation theory as well. These are all theories of private rights unable to explain the unity and perpetuity of the juristic persons. Even in the domain of ownership the theories allow all the present members of a group to divide among themselves the group-property. Surely such a conclusion is admittedly opposed to the notion of subjective right. Hence the need of a better theory---the realistic Gierke-Maitland theory of juristic personality. Gierke gives a condensed account of his theory in connexion with the legal position of communalities, unions and companies. In a group we find a jural person because not only the juridical order but also the inner life of the group demands a right-and-duty-bearing entity other than the individuals constituting the group. The essence of jural life is juridical capacity. A union, that may be called a juristic person, is equivalent to an individual in the sense that the intellectual bodily unit of life assures the expression of jural intention in outward acts. The argument that our perception presents to us only individual persons is according to Gierke faulty. The dominant idea is that in every case only one question is to be asked. Is there a right-and-duty-bearing entity present? If so the entity must be called a person. The intention and capacity are the factors that determine the applicability or otherwise

of the juridical construct. In the case of a group-person there is the group-intention and the group-capacity.

Here I shall refer to certain pertinent observations of Prof. Freund. Theory of personality has attributed certain psycho-physical features to jural bodies, *viz.*, act, will, capacity, etc., so that group-persons even according to the realists have formed new species of humanity. Now if this conception of organism be discarded it becomes necessary to analyse the terms corporate will, corporate acting capacity, etc.

Corporate Will.

Let us consider the corporate will. "In its simplest and most obvious meaning this is the personal will of the associates acting under the bond of association. This will is the product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission. Where under the operation of these factors we obtain a unanimous resolution, we may clearly speak of corporate will. But we are also justified in assuming a correct expression of corporate will, where of the associated persons only a portion, representative in number, character and position, act habitually, while the rest sustain a relation of acquiescence, dependence or incapacity. A unanimous expression of the adult male members of a political community may therefore be accepted as embodying the aggregate will."

It follows as a natural consequence of the realistic theory that a juristic person expresses a representative will in all the juristic acts.

Gierke of course would call this by a different name—the group-will. The tangible result is however that the law must view a juristic person as a real person whenever certain juristic acts can be performed by the entity—although a physical person may not be performing the acts. The only real element is the concurrent will of the representative body. But it may happen that in a corporation the corporators are opposed to each other as adverse parties either in internal matters or in juristic relations. The adverse interest of the member precludes him from representing the corporate will.

The question of the proper course to adopt depends in such a case on judgment and expediency. But who should be the judge in these circumstances? The true corporate will would no doubt be expressed by unanimous action resulting from common deliberation and mutual compromise and submission. But law cannot afford to wait. It is not satisfied with vague rules, it says that in like cases the concurrence of the majority will determine the course of action. The majority is neglected because irrelevant. In all these cases we indulge strictly speaking in a fiction, but such fictions based upon the neglect of the irrelevant are very different from fictions

which mean the substitution of an imaginary conception for a substantial non-entity.[1]

Gierke and Realism.

Gierke explains realism, by the logic of facts. He never asserts the identity of organised collectivity with a human organism. Collective will to which the consequences of law may be attributed is the principle of the reality of a juristic person. The State is a real person because it possesses all the elements of reality, an exterior organ for willing and acting, a collective will which is inherent in the entity itself. So a foundation may function as a person, but in the case of a deity an unqualified statement is not possible as will be seen later on.

Personification in Law.

Before concluding the summary of the theories of juristic personality let me interpolate some considerations regarding personification in law. Personification is, in the eye of many a jurist, a symbolic process. In fact the impression produced by the discussions of neo-realists in jurisprudence is that the juristic person, after all, is nothing but a sort of imagined person supposed to exist for the purposes of legal expediency. So the assimilation of a juristic person to a subject of rights is at best a fictitious process. The imagery is there but nothing supposed to be represented by the image can be made out. Ihering says that

[1] Freund, L. C. S. 31.

one may say that the personification, if baseless, may be compared to a legend in a supplier's catalogue which says that when bitumen cannot be found, wood may represent bitumen. But the idea of personification is not an allegorical process, it is fraught with important consequences. Let me dwell on some of the consequences of the theory of personification briefly.

The constitutive conditions of personality place the individual human beings as well as associations, foundations, and other groups in a distinctive category—the category of persons. Even when the state for political or economic motives demands that a group should obtain the consent of state, in order that it may act as a juristic person, the state authorisation is not a concession of capacity but a recognition of personality. The personality results from the intrinsic nature of the organism. It is not granted, it is not conceded to the organism. It is a necessary consequence of certain elements of facts which call for legal recognition. The essential point is to determine the occasion of legal recognition and not that of a *de novo* jural creation. Here it is important to know at what point of time the personality of a juristic person begins. When is the person born so to say. There is no doubt that the personality begins from the moment when the constitutive elements are found united in an entity ; for example in the case of an association from the

moment of constitution of an association, in the case of a foundation from the date of the establishment of a foundation. Any way it is not necessary to ascertain whether the institution has commenced to function in its jural capacity. The reality here is a juridical reality, and the rule of law fixes its character once for all. The person begins his life before he begins to act. This anticipation of capacity results according to the fiction theory in a retrospective consequence. The question of the date of birth of a juristic person gives rise to some important practical issues. Take the case of foundation by a will. The testator at the time of creating the foundation, makes it a legatee. In order that the legacy may be effective, the foundation should be able to accept the legacy at the time when the will speaks, but if authorisation is necessary to complete the personality of the foundation, the authorisation may be delayed. The death of the founder then presents a complication. Again one may leave a legacy to a foundation established but not authorised. Here the death of a third party presents the same complication. In all these cases practical necessity demands that the existence of a juristic person should not be dependent on the authorisation from an outside body. The person is discovered and not created on every occasion.

The principle of personification has an important bearing on the suppression of personality.

This act of suppression should be left to the discretion of the administration responsible for granting the concession constituting the personality, if the administration has only to recognise it the whole matter presents a different aspect. It will be difficult to avoid the conclusion that in the latter regime the state must yield to the tribunal. The juridical construct will dominate the question at issue.

Hauriou and representative phenomenon.

To resume the main thread, Hauriou has made a remarkable attempt at setting forth a comprehensive theory. The fundamental idea that he has introduced in the discussions regarding the personality of group-bodies, is the one of reality of representative phenomenon. Passing this phenomenon under review in its various manifestations, he shows that the representation is not a fiction but a real fact which grows out of the fusion of the wills of the representatives with those of the represented. In an associative group it is seen to take the form of a human volition. This fusion is, however, not complete. Law is obliged, in order to consider the volition thus disengaged as a unique volition, to give to this phenomenon a continuity and importance which it has not in reality. But the process is familiar to law. Even in the notion of individual personality it works by way of abstraction, by putting in relief certain phenomena as simple and

continuous which truly speaking are complex and discontinuous. "The individual personality juridically conceived appears continuous and identical to itself, it is born with the individual, it is constituted at the first start, it remains always the same during the existence of the individual, it sustains continually immovable juridical relations, it is awake while the individual is asleep, it remains sane while he is insane, sometimes it continues even after death, because there may be the successor—the continuator of his persona. But as a matter of fact the volitions of men are intermittent, changing, contradictory; the volitions vary even with regard to one and the same object. On this everchanging, tumultuous face of men agitated by many caprices and passions law has put an immobile mask." [1] The volitions of a juristic person, like those of individuals, are not always the same, nor are they always active. It is sufficient for law that they exist, it will make it the basis of juridical personality of the collectivity. "The part played by fiction is not greater here than in the case of physical legal persons and the fiction, moreover, is not the work of public authority but that of the social medium." [2]

There is some truth in these observations. But, it must be remarked, that the theory applies only to voluntary groups. In these there is

Objections to Hauriou's theory.

[1] *Loc. cit.*, p. 140.

[2] *Loc. cit.*, p. 130.

at least a persisting volition that continues notwithstanding the opposition of some of the members—this is the volition to carry on the work of the association. One may say, then, that here is a fusion of individual wills, a sort of unanimity. But in the State or the commune where the will of the minority prevails, where no such unanimity prevails, there is too much of fiction to assert that individual wills are fused into a common volition. The difficulty is greater as Hauriou himself admits, in the case of endowments. Because the beneficiaries,—the poor, the sick, the students, etc.,—are the persons represented by the managers of the corporate charities. Surely it is a gigantic fiction to suppose that the will of the corporation here is made up of the wills of the future and present individuals. There is another objection to the theory as put forth by Hauriou. In admitting the reality of the fused volition why not attribute it to each of the individuals in the group and not to the group itself? Perhaps the answer will be "the volitions are systematised into a unit." But the operation of the volition is similar in the case of non-corporate groups as in the case of corporate groups, *e.g.*, in the case of co-owners, the manager of joint families, members of a political party. What is the criterion for distinguishing the phenomenon in any of these cases from that of the juridical personality? It is necessary then to prove the 'real' existence of fused volitions.

Representative Unity.

Hauriou comes back to the question in his book on Social Movement.[1] Here, however, he has modified his theory. He rests the unity of the corporative will on what he calls the "representative unity," that is to say the agreement of mental representations existing at the interior of a corporation. "It is necessary that at the interior of the corporation and about it in the social medium, there should be a unanimity of mental representations giving rise to corporate rights. These mental representations can only be the works of representative solidarity. The members of the corporation form an idea of association, its aim, its interest, the rights that it ought to have and the acts necessary for exercising these rights. On all these points the representative unity is accomplished not in virtue of the unity of the organism, but by unanimity.....The rights realized are those wished for by the unanimity of wills based on an unequivocal mental representation. Hence they may be, I conceive, attributed to a unique moral person." This is substantially the idea of fusion of volitions expressed in new terms. Only in this statement the theory of unanimity is mixed with the organic theory. When the unanimity is not obtained, constraint becomes necessary; it is furnished by the social organism in the interest of the organism itself;

[1] Leçons sur le movement social.

that is why when a *de facto* unanimity is unobtainable a *de jure* unanimity is made to result from the decision of the majority.

Boistel's theory.

Boistel has attempted to show that juristic personality flows, as a consequence, from the definition of personality. For him man is a person, because he has a supreme directive power which other beings have not. Personality is nothing else than 'liberty' the term is taken to denote not the liberty of indifference but the liberty to direct oneself according to a superior light. "It is the voluntary activity of man, the reflective activity of enlightened reason, the activity in which he himself is the master of his directive movements, that constitutes his personality ; for it is that which invests him with rights and duties. Rights and duties would have had no meanings for him if he were a passive instrument of nature."

The definition of the word 'person' thus being given, the question is to find out whether it cannot be applied to beings other than individual men. The author says it applies equally to groups of persons "provided that as groups they are endowed with the same powers of action as the individuals and have the similar capacity of impressing their powers on the directive movements." He then shows that the moral persons fulfil these conditions, *e.g.*, the corporation as a typical moral person has a free and intelligent power. In this

view the deity will be a full juristic person if a similar assertion can be made with regard to it. But I shall show in the last lecture that such an assertion cannot be made.

Criticism of the continental theories.

Most of these theories are unsatisfactory from the juridical standpoint, because they attempt to prove that the personality of juristic persons is comparable to the philosophical personality of human beings. This will not do. Jellinek, with whom Michoud agrees, as well remarked that "it is necessary to separate thoroughly the juridical from the philosophical standpoint." But Jellinek himself has not arrived at the true solution of the problem of juridical personality. He has laid too much stress on 'volition' in the notion of juristic personality. Taking this volition as an essential element he proceeds to its juridical definition which according to him is different from its philosophical definition. In substance, however, he has substituted a fiction for reality. A passage in *System der subjectiven offentlichen Rechte* (p. 28) reads:—"There are, according to viewpoints of observation, different aspects of the same object, similarly the same object may give rise to different notions according to the positions one takes with regard to it; these notions can be identified only by method scientifically vicious. For the physiologist and for the psychologist a symphony of Beethoven is the same thing—a succession of

movements producing a succession of sensations. For the æsthetician, on the contrary, it is a distinct thing which exists at least in the world of æsthetic sentiments and should be studied as such. It is the same of juridical institutions. The question which is put to the jurist is not whether these institutions exist in the physical world as individual beings, it is asked only how they should be conceived in the world of human relations to which they appertain. Nothing is more dangerous than to confound these two classes of ideas. The methodical 'synchretism' is one of the scientific vices of our epoch. The method of the natural sciences, the empirical researches, the biological investigations tell us of sensational discoveries. On the one hand the jurist is reminded that a juristic person, not having a head or legs is not a person. On the other the epoch-making discovery is made that the group-body, like the bacilli, the fern, the mammiferi, belongs to a special individualistic category." The juridical world it must be remembered is not a physical world. It is a world of beings existing in the human thought. These beings although they may result from abstract speculation, although they are abstractions themselves, are none the less real like the mathematical entities. No one denies the existence of a point, a straight line, nor does one regard them as fictitious, although these can never be seen nor perceived. The jurist has to seek for

the juridical and not the physical essence of personality.

Personality of the State.

Take the case of the state. It has like all corporations two characters. In the first place it is a group of persons regarded as units. The idea of unit in the practical world is a wholly subjective idea ; the only real unit is the atom whose existence is mentally admitted. The bodies are composed of different elements which in turn are united in our conception through an abstracting process. In the case of a group-body the common aim is the unit. Just as for the physicist or the chemist there are no chairs, tables, houses, but only wood, metal, stone so to the jurist the forms of groups do not count but only the aims. In the next place the group forms a person. This notion of personality is purely juridical, which expresses only the capacity of being a subject of rights and duties. If it exists for the benefit of the individual man, it is not in virtue of his nature itself but only in virtue of law and a long historical development. Jellinek, like the preceding authors quoted, admits that the juristic subject must have a personal volition, but to him this volition appertaining to the group-person is not fictitious. He says " we conceive this volition as a distinct volition in virtue of the intellectual necessity that compels us to admit the unity of the juristic person. The moment the unity is recognised, all acts should

be attributed to the unitary aim of the collective body. These acts will then be in the physical world the acts of individual will but in the jural world the acts of the collective will." This *de facto* personality becomes *de jure* on account of legal recognition.

Gierke-Maitland theory.

This theory has the merit of leading us to the juridical domain, its main defects being its great leaning towards a singular volition. It attempts to prove that a juristic person has a real will, but the attempt has not succeeded because the demonstration amounts to saying that the juristic person has not a real will—but by a natural conception, our mind being constituted as it is, we attribute the mentality of individual men to groups and other entities. The partisans of fiction theory say as much and the objections raised against that system equally apply here. I hope you notice that all the theories so far mentioned attempt to explain juristic personality by explaining it away. The fictionists openly admit as much, the realists except Gierke and Maitland clothe their denial in a vague garb of mentality. The system of these theories may be characterised as the negative system. It is fitting to close the account of this system by a resume of what two distinguished 'negativists' have to say—I mean Hölder and Binder. But the conceptions of these two jurists differ so much from those of

the allied school that Saleilles calls them ultra-realists. Let us see what explanation of moral personality or better still, juristic personality, ultra-realism has to give.

Hölder and juristic personality.

Both Hölder and Binder start from the same point although they arrive at different destinations, rather they have employed the same process to arrive at different conclusions. They have been analytical, they have decomposed the machinery of personality into its separate parts—*disjecta membra*. For Hölder personality even in its juridical aspect is indistinguishable from psychological and ethical personality ; for Binder it is only a juridical relation, a manner of conceiving the ensemble of legal relations destined for a particular aim. It will be better to take these two views separately, remembering however that Hölder's is the deeper of the two.

Hölder has adopted what he calls the relativistic notion of personality as I have just told you ; juridical personality is identical with ethical personality so much so that the variation in one concept will entail a like variation in the other concept. Juridical personality is not absolutely constant in value, it is susceptible of being increased and diminished. The common law affords an illustration of this statement, it does not invest an infant, a mad man, a *feme coverte* with the same quantum of legal capacity although it regards

them all as persons. This notion of relativity forms an essential feature of Hölder's theory. Binder also agrees in this, but otherwise the two differ. Hölder thinks that man alone can be a person, and that every other subject of rights is an entity, a juridical entity, of a different type. The assimilation of juridical to ethical personality, if carried to its logical conclusion, will lead to the classical *Willenstheorie*, because the personality of man, being the true juridical personality, must connect the latter with intelligence and will. Hölder is then a re-incarnation of Windscheid, although he will not admit the fact.

Binder's view.

Binder, however, does not adopt the identification of the kind entertained by Hölder. He completes the Iheringian definition of law, which separates the subject from the object of law, by observing that the aim of law is social order. Into the conception of personality he has introduced this socialistic element. Now, the preservation of social order means the use of force, when necessary. This element of power, considered in relation to legal capacity, gives rise to the notion of personality. The power may be recognised with regard to an individual or an aim, and hence, juridically speaking, there is an individual legal person or a group-person. This theory, then, takes no account of volition in the psychological sense, and gives a more satisfactory explanation of the juridical conditions

prevailing in the group relations. But it must be observed that Hölder and Binder have failed to take into consideration the unitary tendency of collective action. The fictionists and the negationists have made the same mistake, and even the ultra-realists cannot be regarded as having constructed a serviceable theory. The realism, as understood by Gierke in Germany and Maitland in England, seems to have been singularly successful. The Gierke-Maitland theory fits in admirably with the facts of law. It explains the continuous existence of a juristic person independently of its agents. The bracket-symbol theory, which regards a group-person as a group of persons bracketed together, is a vain symbolism. How can it explain a corporation sole ? How can it apply to a religious endowment ? It cannot be accepted as a general theory. The fiction-theory and the concession-theory have met with a skin-deep acceptance, as Professor Geldart has remarked. The most satisfactory theory is that, which has supplied a juridical construct, applicable to universal juridical phenomena. The Gierke-Maitland theory has furnished the light in which the juridical nature of the Hindu Deity should be examined.

LECTURE III

Juristic position of Deities in Hindu Law

Content.

After the long preamble, I come to the main topic of my lectures. In the last two lectures I dealt with the problem and theories of juristic personality just to show that a juridical construct must be properly used in order to arrive at a reliable conclusion in any concrete case. I shall presently illustrate the misuse of a juridical construct by citing some well-known decisions of law courts, which decisions seem to accept the view that the deities are juristic persons in Hindu Law. But let me take up first the characteristics of the gods as found in the Vedic and the Mīmāṃsā texts.

The following are quoted from Geldner's *Vedismus und Brahmanismus* :

Vedic Gods.

" The gods sleep not. The gods shed no tears. The gods do not eat, they do not drink. The gods are made of truth, men of lies. What is conceivable to men is inconceivable to gods, and what is incomprehensible to men is comprehensible to gods. For gods love incomprehensibility.

" As the gods will, so would it happen. No one can prevent it, yea, not even a wretched mortal.

" All, that the gods favour, is good.

" The trouble, that the gods favour, is not thrown away. One cannot become a friend of the gods without taking pains. The gods seek every one who brews *Soma*, they need no sleep, unfatigued they travel. The gods sleep not, they shed no tears. The gods do not visit one another at their houses. The gods eat not, they drink not, they are satiated merely with a look at the nectar. The gods eat not of the sacrificial offerings. The gods have no antipathy to anything. The men seize the present, the gods depend on the sacrifice, the *pitṛs* on the oblation-cakes (*piṇḍas*). The gods set their hopes on those that have not performed the sacrifice, from them that have performed the sacrifice they run away like a chasing animal let loose. As a man does to the gods, so the gods do to him. Man conceives with thought, the thought goes over to the exhalation, the exhalation to the wind, and the wind enumerates the thoughts to the gods as the thoughts of men. So a *Ṛṣi* has said : 'Man conceives with thought that goes over to the wind, the wind enumerates to the gods, O man ! what thy thought is. Men conceive in thoughts that penetrate the gods.'

" *Iḍā*, the daughter of Manu and the sacrificial goddess, prophesies of the gods : They have attained dominance, they have finished with the world, they have become holy, but they cannot have children.

"As many gods are in existence as there were at the beginning. Gods were like men at the beginning. They were mortal at the beginning. The year is for the gods a very short time. The year is only a day to the gods."

There is so much anthropomorphism, mixed up with mysticism, in the Vedic conception of the deities that an entity of the type contemplated in the Vedas is not of any use in the jural world. I shall show in the sequel that the Mīmāṃsā texts definitely support the view that the deities, as spiritual entities, are incapable of bearing rights and duties in the juridical sense of these terms.

Oldenberg and the Vedic Gods.

Oldenberg, in *Die Religion des Veda*, remarks that the gods appear in the Vedas as accessory materials, the sacrifices being the principal objects that matter. It would be impossible in this view to attribute any juridical capacity to the gods. In later texts of the *Śāstras* we find discussions regarding the capacity of the deities. Most of the authorities, however, agree in denying to the deities what the Germans call *Handlungsfähigkeit*. It is this denial of physical capacity, coupled with juridical incapacity, that stands in the way of conceding full personality to the deities; because I have told you that, if you are to call an entity a person in law, you must be able to predicate of this entity a double capacity—jural and physical. Of course, in many

cases, the physical capacity is indirectly attributed to the entity, but, any way, the possibility of coupling the two should be there. Let me review what the later text-writers and commentators say about the capacity of the gods.

Śūlapāṇi and the gods.

Śūlapāṇi, in his *Śrāddhaviveka* (p. 23), says: A Śrāddha is regarded as a kind of sacrifice, and is termed *pitṛyajña*. Who are competent to perform a sacrifice? Śrīkṛṣṇa, the commentator, cites as a Mīmāṃsā-Sūtra a text to the effect **तिर्यक्पङ्क्त्यार्षेय-देवानां नात्राधिकारः**, and explains it thus: The following are not competent to perform a sacrifice, *viz.*, birds and beasts, the cripple, the three, *i.e.*, the blind, the deaf and the dumb, as well as the *deities*. The grounds are: the birds and beasts have no ownership of property, the cripple cannot move, the blind cannot see the sacrificial offerings, the deaf cannot hear the *mantras*, the dumb cannot recite them, the deities have no ownership of or right over any articles, and the text is, **यागे तु स्वं विनियुञ्जीत** : one should use his own property in a sacrifice. Śrīkṛṣṇa advocates the extreme Mīmāṃsā doctrine that the deity is not a sentient being in the full sense, and so cannot acquire property or even receive it by gift, inasmuch as he cannot declare his acceptance by saying 'this is mine' (**ममेदमिति स्वीकाराभावाद् द्रव्य-स्वाम्याभावः**). Gods are said to be persons made of *mantras* : "**देवता मन्त्रमयी,**" "**प्रजेशं मन्त्रविग्रहम्.**"

The Uttara-mīmāṃsā, however, advocates the theory that deities have consciousness, and can reward the votaries, who offer sacrifices. Yet a gift to the gods is not a gift in the primary sense: **देवाय दानं गौणं तस्य मुख्यसम्प्रदानत्वाभावात् किन्त्वनिराकर्त्तृकं सम्प्रदानत्वम्। तत् तु त्याज्यद्रव्यस्वामित्वारोपविषयत्वम्.** "A gift unto the gods is only so in a secondary sense; they cannot have the primary capacity of being recipients of gifts, but they can have the capacity of being recipients in a subsidiary way: the latter means that they can have the ownership of the offerings attributed to them." The recipient in the primary sense is one, who can have ownership himself of the offerings: **सम्प्रदानं तदेव स्यात् पूजानुग्राह्यकं मया। दीयमानस्य द्रव्यस्य स्वामित्वं लभते यदि.** "That alone can be the principal recipient, capable of benefiting the votary, which can acquire the ownership of objects offered by me." **निराकर्त्तृकं सम्प्रदानं मुख्यसम्प्रदानम्** or recipient in the primary sense, **अनिराकर्त्तृकं सम्प्रदानं गौणसम्प्रदानम्** or recipient in a secondary sense. Hence by abdication with reference to a deity the abdicator's right shall go, but no right shall accrue in the primary sense to the deity, according to the Smṛtis. So the uses **देवग्राम**, etc., are secondary. Śūlapāṇi, *Śrāddhaviveka*, p. 25, adds: **देवतात्वञ्च वेदमेयत्यागोद्देश्यत्वम्। उद्देश्यत्वञ्च तस्येदमित्यारोपज्ञानविषयत्वम्.** "The status of being a deity means one, in reference to which there can be an offering according to the Vedas. Thus **उद्देश्यत्व** means the status of being

the object of the supposititious knowledge that the thing offered belongs to the offeree.

Raghunandana explains **देवद्रव्य** or the property of the deity thus : **देवनिष्ठालौकस्वामित्वनिरूपितस्वत्ववद् द्रव्यम्**, *i.e.*, the property, wherein a right accrues in pursuance of an unreal ownership inhering in the deity (**एकादशीतत्त्व**, p. 135, **चण्डीचरण**). This has arisen in connexion with the expiation (**प्रायश्चित्त**) of one, who misappropriates the property of the deity. See also p. 173. Raghunandana further says in connexion with the offering of tooth-sticks, etc., unto the deity : **देवस्य स्वत्वानुत्पादनाद् दानपदं गौणम्**. "The word **दान** is, in this concern, used in a secondary sense—no right can properly accrue to the deity." Raghunandana (**शुद्धितत्त्व**, p. 557) cites from **मत्स्यसूक्त** :

Raghunandana and the gods.

देवे दत्त्वा तु दानानि देवे दत्त्वा च दक्षिणाम्। तत् सर्वं ब्राह्मणे दद्या-दन्यथा निष्फलं भवेत्, and arrives at the conclusion that, as the deity cannot in any real sense accept the gift, the ownership of all offerings unto the deity really inheres in the *Brahmin* votary, who seizes it first. This seizure is called **उत्तरप्रतिपत्ति**, *i.e.*, acceptance just after the offering : **शुद्धितत्त्व**, p. 55, **चण्डीचरण स्मृतिरत्न**.

Raghunandana, **एकादशीतत्त्व**, **जलाशयोत्सर्ग**, the commentator Gosvāmin says (**चण्डीचरण**, pp. 178-179) : **देवपूजादौ देवताप्रीतिमुद्दिश्य द्रव्यत्यागान्न देवानां तत्र स्वत्वम्**. "Inasmuch as articles are only offered in the worship of the deity, etc., with the object of the satisfaction

of the deity, the deity has no right thereto." The opponent takes the extreme course that the deity cannot have any right, because of the absence of consciousness, the conclusion drawn by Gosvāmin following Raghunandana. A middle course is that, although, out of deference to the texts, deities have satisfaction by the offerings of votaries and can reward them, yet they have nowhere been recognised as having consciousness so much as to be recipients of gifts in a secular sense.

Mādhava, *Jaiminīyanyāyamālāvistara, ad* Jaim. IX. 1. 6-10 (pp. 421-422, Ānandāśrama), after stating the opponent's view that the existence of the deity is the incentive to all rituals, because the deity worshipped can offer reward, and that this capacity of rewarding is possible, because from Vedic *mantras* and laudatory texts we find that the gods have the five attributes, *viz.*, (1) form, (2) acceptance of offerings, (3) eating of the same, (4) satisfaction, and (5) a benevolent mood, refutes it *inter alia* on the ground that the said five attributes of the deity are not primary. Raghunandana has made one exception in favour of the deity, *viz.*, his capacity of being the principal recipient as to the land on which the shrine stands (मठप्रतिष्ठातत्त्व, "देवस्वम्प्रदानकदानानि," p. 672). So much for some of the important texts ; let us find out their bearing on the juristic personality of the deities.

The juridical construct, that is at the basis of the notion of juristic personality, is that any right-and-duty-bearing entity is a person. Whenever any assertion is made with regard to the entity, one must be satisfied as to the fundamental legal capacity, that the entity may have. In some Indian decisions, the juristic personality of a deity has been taken for granted, because some eminent jurist has regarded the idol as the owner of property in an ideal sense. So in

The nature of the deity.

Vidya Tirtha Swami v. *Vidya-nidhi Tirtha Swami*, I. L. R. 27 Mad. 451 (where the question was whether a Pandarasannadhi forfeited his position as such by reason of lunacy) the juristic nature of a *Hindu* deity was adverted to, and it was remarked: "The religious foundations known as *debutter*, devasthanams or temples are primarily intended for spiritual purposes. The presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested." But the assertion that the idol is a juristic person is seriously open to doubt. One may naturally ask whether the community itself, for whose spiritual benefit the institution was founded and endowed, may not more appropriately be regarded as a corporate body, forming the juristic person in whom the properties of the institution are vested. From the realistic standpoint, which is adopted in these lectures, it seems pertinent to follow Savigny, who

says in his *System of Modern Roman Law*, Vol. II, Book II, Chapter II, Section 88 (*Jural Relations*): "Since, then, under the government of Christian princes Church institutions appeared as juristic persons, what is the precise point to which we have here to ascribe the personality, or how are we to form an accurate conception of the subject-matter of the rights of property existing in them?" Above all, the following contrast to the earlier period is here unmistakable. The ancient gods were conceived as individual persons, resembling individual visible men that one sees around one, and nothing was more natural than that each of them should have his own personal property, while it was a further development of the same thought, when the God, who was venerated in a particular temple, was represented as a juristic person and indeed even granted personal privileges. The Christian Church, on the other hand, rests on the belief in one God, and it is united together by this common belief and by the distinct revelation of that one god to one Church. It was an easy matter, therefore, to import the same principle of unity also into property relations. Thus it happened that at times Jesus Christ, at other times the Universal Christian Church or her visible head the Pope, was designated as the proprietor of the Church Estate. But a closer consideration leads on to the view that in law it is the ecclesiastical corporation that is the subject of rights. The choice of the *corpus*, into

which the law breathes the breath of juristic personality, is determined by the juridical construct adopted. The deity may be called the ideal owner, but in law he is far from being so practically. The Mīmāṃsākāra has definitely laid down that, as the deity has only a supposititious existence, his substance consisting of *mantras* alone, he cannot be a right-and-duty-bearing entity, and therefore is only a *nomen personae*, and not a *person*. The sole text, applied to a Hindu deity, does not bring out the essential features of a juristic person. Thus the remark in *Vidya Varati Tirtha Swaminga* v. *Baluswami Ayyar*, 26 C. W. N., p. 547 : "Under the Hindu Law the image of a deity of the Hindu Pantheon is a juristic entity," cannot be considered as going to the essence of the problem. Where the right-and-duty-bearing entity is distinctly some one behind the deity, the latter is only an adjunct, serving some extra-jural purpose.

The very fact that the deity alone cannot support an establishment, that he must stand either behind a manager or a trustee, rules him out of court. He is a person in name, not in law for all purposes.

A general endowment for the worship of God, without naming the deity for whose benefit the endowment is to take effect, is void for uncertainty. This view, adopted in *Chandicharan Mitra* v. *Haribola Das*, 46 Cal. 751, may appear to point to the juristic personality of a deity. Let me consider the case briefly.

The plaintiff brought a suit to recover possession of certain lands on a declaration of title. A point in the case was, was the property *debutter* ? The document, under which the endowment was established, conveyed to one Santiram Bairagi the property for the purpose of the *sevā* of God. It was held that, as a particular deity was not mentioned, the endowment was void for uncertainty. Apparently, the equitable principle applicable to all trusts was considered. Now, as we all know that the mere fact that an entity is a beneficiary of a trust does not entitle the entity to be called a person, the deity as a beneficiary merely cannot be regarded as a complete juristic person. So the case under consideration fails to establish the juristic personality of a deity.

Idol and its power to accept a gift.

Again, in *Upendralal Boral* v. *Hem Chandra Boral* it was held: "No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death." From this some have argued that the idol is a juristic person, capable of accepting a gift. But such a position is not tenable, because an idol cannot be said to have juridical existence, unless it has been consecrated by the appropriate ceremony performed and *mantras* pronounced: *Doorgaprosad Dass* v. *Sheoprosad Pandah*, (1880) 7 C.L.R. 278. As soon as the consecrating ceremony has been over, the idol, in the eye of law, begins a

notional life, but its juridical capacity must be determined by the legal construct, appropriate to the case. Here the Vedic doctrine and the Mīmāṃsā interpretation must be relied on to delimit the orbit of activity of an idol. The *mantra* breathes a spiritual life into the *vigraha,* but the latter is not competent to function in an ordinary juristic capacity. The deity cannot, hence, be styled a full juridical person.

Frequently the fact that a *shebait* of the idol is entitled to administration in respect of *debutter* property by virtue of Act V of 1881 (Probate and Administration) is urged in support of the view that the idol as an owner of property is a juridical person. But such a conclusion is a perfect illustration of the misuse of symbolism. A concept is clothed in a symbolic dress, and then a meaning is read into it, although the process is wholly unwarranted. In fact the text-writers have definitely asserted that *debutter* is not the property of the deity: it is dedicated to a purpose, and the manager or *shebait* is only a trustee for the purpose. In *re Dean* a trust was created for the maintenance of the settlor's dogs and horses, thereby the dogs and horses were not converted into juristic persons, although the trust was for their benefit. The deity is made to intervene in many religious endowments for spiritual purposes, which do not necessarily make the deity a secular juristic person. For in all cases the deity is not the

subject of a right, he can seldom perform a juristic act.

Again, in *Sitaramji* v. *Jadunath Singh* (24 I. C. 1914) it was remarked: "Under the Hindu Law an idol, as symbolical of certain religious personages, is capable of being endowed or vested with property. An idol is a juridical person capable of taking or holding property, although the idol holds property in an ideal sense through its manager or shebait." I want you to note this concluding remark, the idol is an owner in an ideal sense. Here, then, the Maitland-Gierke test evidently does not apply: the idol, notwithstanding the statement to the contrary of the judges, is not a juristic person, at least, not a complete person.

In *Prasannakumari Debya* v. *Golabchand Baboo* (2 I. A. 145) the position of the deity as the owner of property is made clear. "It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must in the nature of things be entrusted to some person as shebait or manager." Apparently, the idol is a superfluous adjunct, so far as law is concerned. It is not a full juristic person.

The danger of analogical logic.

A superficial analogy has sometimes misled eminent judges, as is seen in the remark of Sir Arthur Wilson in *Maharaja Jagadindranath Roy Bahadur* v.

Rani Hemantakumari Debi, 31 I. A. 209: "There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though only in an ideal sense." Here there is considerable doubt as to the appropriateness of the term 'juridical person.'

In *Narasingha Swami* v. *Venkata Singam* Kumaraswami Sastri, J., while deciding that an idol is not a living person within the meaning of section 123 of the Tr. Prop. Act, let fall the remark that in law it was recognised to be a juristic person. But it is evident that such a dogmatic statement cannot be made in the light of the most modern theories of juristic personality.

I shall take up in conclusion the famous Full Bench decision in *Bhupatinath Smrititirtha* v. *Ramlal Maitra*, I. L. R. 37 Cal. 129.

But let me interpolate some further observations regarding the nature of Hindu deities, before I come to the conclusive argument of Mr. Justice Mookerjee in *Bhupatinath's Case*. I should like to stress the point that the logic of analogy is not always reliable, because analogy is based in many cases on a superficial resemblance. A salient example of a *suggestio falsi* is given by the attempt at making a deity a corporation sole. Some judges have remarked, as for example in *Vidyavarati* v. *Balusami*, that under the Hindu Law the image of a deity is a juristic person, having the capacity of receiving gifts and

A *suggestio falsi.*

holding property, and this statement is made, although there are various texts, which definitely say that a deity cannot own property, and suffers from many other incapacities, such, for instance, as are summed up by Pārtha-sārathi Miśra in the text देवतानां त्वात्मोद्देशेन त्यागासम्भवाद्विग्रहाभावाच्चाशक्तेरनधिकारः. Again, others have called a deity a corporation sole. Here the logic of analogy has betrayed its weakness. The juridical construct, applying to the concept of a corporation sole, can only live in the region where it has been acclimatised. Hindu Law does not supply its necessary elements. To the students of English law Maitland's observations on the corporation sole are familiar. I need not repeat them. Only I should like to state that the juridical construct, that applies to the king or the bishop in English Law, does not apply to a deity in Hindu Law. A deity cannot be called a corporation sole without doing violence to the notion of corporation itself.

Limited juristic capacity of a deity.

In *Bhupatinath Smrititirtha* v. *Ramlal Maitra* two questions were referred to the Full Bench for decision: (1) Does the principle of Hindu law, which invalidates a gift other than one to a sentient being, capable of accepting it, apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make such a bequest void? (2) Whether the cases, which lay down the proposition that a gift to a

Hindu deity, whose image is to be established and consecrated in future, is void, were rightly decided? Mookerjee, J., said that both the questions should be answered in the negative, and that was the unanimous opinion of the Full Bench. Now, in coming to this decision, Sir Asutosh Mookerjee reviewed the texts, which assert the capacities and incapacities of the deities. I have already mentioned some of these. I shall quote them more fully (although this entails some repetition) just to prove that the only valid conclusion, deducible from the arguments in the texts, is that a Hindu deity is not a complete juristic person.

The incapacity of the gods.

That the gods cannot own property is made clear from the following :

अन्यदेश्यकोत्सर्गविषयस्यास्वामिकस्य ग्रहणे देवस्व-ग्रहणवत् प्रत्यवायात्। एतद्विषयकमेव देवस्वं ब्राह्मणस्वं वा ये हरन्तीत्यादि वचनम्। अन्यथा चौर्यस्य पापहेतुत्व-सिद्धौ ब्राह्मणस्वहरणनिषेधानर्थक्यम्। एवञ्चान्यथानुपपत्त्या स्वपदहरणपदे लाक्षणिके।

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another, as from the taking of the property of the gods. The text "Those who steal the property of the gods or the property of Brāhmaṇas, etc.," refers to this subject. Otherwise, as theft is already established as a cause of sin, the prohibition of the stealing of a Brāhmaṇa's

property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' and 'stealing' must be taken in a figurative or secondary sense."

Again, Śūlapāṇi (already mentioned before), in his *Śrāddhaviveka*, discusses whether a *sradh* can be called a gift, and in that connection observes as follows :

न च दानरूपता। उद्देश्यपित्रादिगतस्वामित्वाजनकत्वात्। अस्वामित्वं च पित्रादीनां ममेदमिति स्वीकाराभावात्। आदित्यादिदेवतासम्प्रदानकदाने तु दानशब्दो गौणस्तद्धर्म्म-दक्षिणादानाद्यतिदेशार्थः। देवग्रामो हस्तिग्राम इत्यादि-प्रयोगस्तु गौण एवेत्युक्तं तिर्य्यगधिकरणे।

Of this passage, the following version will give a fairly accurate idea :

"A *śrāddha* has not the nature of a donation, as it does not generate ownership in the father, etc., for whom it is intended. The absence of ownership here is due to the absence of acceptance on their part with the words 'this is mine.' In a donation, having for its donee a god like the Sun, etc., the term 'donation' has a secondary sense, the object (of this figurative use) being the extension to it of the inseparable accompaniment of that (*i.e.*, a gift in its primary sense), *viz.*, the offer of the sacrificial fee, etc. It has been remarked in the topic of the brutes that such usages as *devagrāma*, *hastigrāma*, etc., are of course secondary."

Upon this passage Śrīkṛṣṇa comments as follows :

देवानां चेन्द्रादीनामचेतनतया द्रव्यस्वाम्याभावात्। तर्हि कथं देवग्राम इति प्रयोगः। गौण इत्युक्तं तिर्यग्गधिकरणे।

"The gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the expression *devagrāma* (a village of the gods) be used? It has been remarked in the topic of the brutes that the sense here is secondary."

Śrīkṛṣṇa, in his explanation of the term *devagrāma*, makes the following comments :

तथा चात्र स्वस्वामिभावरूपसम्बन्धबाधान् मुख्यप्रयोगो न भवत्येव। किन्तु तदुद्देश्यकत्यागे षष्ठी लाक्षणिकी। तेन देवोद्देश्यकत्यागविषयो ग्राम इत्यर्थे गौण इत्यर्थः।

"Moreover, the expression cannot of course be used here in its primary sense, as the relation of property and proprietor is excluded. But the genitive case (in *deva* in the term *devagrāma*) means figuratively an abandonment intended for them (the gods). Therefore, the expression is used in the secondary sense of a village, which is the object of an abandonment intended for the gods. This is the purport."

Śabara, in a passage thereanent *ad* Jaimini IX. 1.9, observes as follows :

देवग्रामो देवक्षेत्रमित्युपचारमात्रम्। यो यदभिप्रेतं विनियोक्तमर्हति तत् तस्य स्वम्। न च ग्रामं क्षेत्रं वा यथाभिप्रायं

विनियुङ्क्ते देवता। तस्मान्न सम्प्रयच्छतीति। देवपरिचारकाणां तु ततो भूतिर्भवति देवतामुद्दिश्य यत् त्यक्तम्।

"*Devagrāma* (village of the gods), *devakṣetra* (land of the gods). These are figurative terms. What one is able to employ according to one's desire is one's property. A god, however, does not employ a village or land according to his desire. Therefore, (he) does not (as was contended) give (anything to his worshippers). Prosperity accrues, however, to the worshippers of the god from whatever is abandoned in the name of the god."

Sabara amplifies this view in the passage which follows, and which need not be quoted at length for our present purpose, and he repeats the same opinion in Chapter 6, Section I (Volume I, page 606), where he speaks of the gods as **अनीशाना धनस्य**, that is, not capable of possessing wealth, and explains the expression *devagrāma* and *hastigrāma* as **उपचारमात्रम्**, that is, as merely figurative terms. See also Adhyāya IX, Pāda I, Sūtra 9 (Volume II, page 14) again, where Śabara asserts that there can be no gift to gods, as they have no bodies and are incapable of enjoyment:

न ह्यविग्रहाया अभुञ्जानायै च दानं भोजनं वा सम्भवति।

This view is supported by Medhātithi, the oldest and most authoritative of the commentators

of Manu. Śāstrī Golap Chandra Sarkar, on behalf of the respondent in *Bhupatinath's Case*, relied upon the following verse of Manu and the commentary of Medhātithi thereupon (Mandalik's Edition, page 1354) :

देवस्वं ब्राह्मणस्वं वा लोभेनोपहिनस्ति यः ।
स पापात्मा परे लोके गृध्रोच्छिष्टेन जीवति ॥

Manu, IX. 26.

"That wicked man, who misappropriates through greed god-property or Brāhmaṇa-property, lives in the next world by the leavings of vultures."

Medhātithi's Commentary.

यागशीलानां त्रयाणां वर्णानां यद्दित्तं तद्देवस्वं ब्राह्मणस्या-यागशीलस्यापि यत् स्वं तद् ब्राह्मणस्वमित्येवमपि श्लोको गच्छत्येव । अर्थवादश्लोकोऽसौ धनं यज्ञशीलानामिति ।

1. The property of persons of the three (regenerate) tribes, that are in the habit of performing sacrifices, is (to be understood by the term) 'god-property' (in this text that is a compound word in the original, in which the word 'god' is not inflected); and the property of a Brāhmaṇa, who is not in the habit of performing sacrifices, is 'Brāhmaṇa-property.' Even in this manner the verse may certainly be explained. This śloka (verse) becomes (then) a laudatory one, (as meaning) the property of persons habitually performing sacrifices.

न। चौर्य्यादिशब्दवच्छब्दार्थपरिभाषापरः।

2. No, (the śloka is not a laudatory one, but) has a meaning, which is derived from a specification or definition of the meanings of the words (composing the term, namely, 'god' and 'property'), like (the meaning of) the term 'theft' and the like.

अतोऽन्यथा व्याख्यायते। देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वम्। मुख्यस्य स्वस्वामिसम्बन्धस्य देवानामसम्भवात्।

3. Hence (the term) is explained in another manner (thus): property, that is relinquished in the name of the gods for the purpose of performance of sacrifices and the like is 'god-property,' by reason of the non-existence with reference to the gods of the primary relation of property and proprietor (a thing is property in relation to a person having proprietary rights over it, and a person is proprietor in relation to a thing over which he can exercise proprietary rights).

न हि देवता इच्छया धनं नियुञ्जते। न च परिपालनव्यापारस्तासां दृश्यते। स्वं च लोके तादृश्यमुच्यते। तस्माद् देवोद्देशेन यत्त्यक्तं नेदं मम देवताया इदमिति तद्देवस्वम्। तच्च दर्शपूर्णमासादियागेष्वग्न्यादिदेवताभ्यश्चोदितं शिष्टसमाचारप्रसिद्धैव गौणोपायदुर्गायागादिषु।

4. For the gods do not use according to pleasure, nor is there found in them any exertion

for the protection (thereof); and such a thing is called property by popular usage. Accordingly, whatever is surrendered in the name of a god, saying "this is not mine, this is the god's," is 'god-property,' and such property is enjoined (by the Vedas) for Fire and other gods in the Darśa-pūrṇamāsa sacrifices and the like (and also enjoined) by the well-known practice of the learned (not by the Vedas, for the gods worshipped) in the Durgā-sacrifice and the like secondary means (of attaining spiritual bliss, but not primary, inasmuch as they are not enjoined by the Vedas).

ननु चतुभजादिप्रतिमासम्बन्धि लोके देवस्वमुच्यते। लोकप्रसिद्धश्च शब्दार्थः शास्त्रे ग्रहीतुं न्याय्यः।

5. It may be argued that by popular usage (a thing) relating to the four-armed or the like images (of gods) is called 'god-property,' and that it is proper to put the popular meaning on words (employed) in the Śāstras.

स्यादेवं यदि देवस्वशब्दो निर्भागः प्रसिद्धिमुपेयात्। देवानां स्वं देवस्वमित्यवयवप्रसिद्धाऽसमुदायार्थः प्रकृष्टः।

6. It would be so, if the term 'god-property' acquired notoriety (in that sense), undivided (into, or without reference to, its component parts, 'god' and 'property'); but by reason of the notoriety of the component parts, namely, god's property is god-property, the meaning not as of the

whole (but as consisting of the meanings of the component parts) is preferable.

न च वाक्यान्तरप्रकल्पनाप्रमाणेनाप्यस्ति मुख्यं चतुर्भुजादीनां देवत्वम्। प्रतिमाव्यवहारेणैवापहृतं [तत्]।

7. Nor is even by means of inferring another passage the assumption possible that the four-armed and the like have the status of gods in the primary sense, for that is removed by the very use of (the term) 'image' (in para. 5).

न च यदुक्तलक्षणमस्त्यथ समाचारतो देवस्वम्। भवतु। स्वस्वामिभावस्तावन्नास्ति यथोक्तेन च प्रकारेण स्वव्यवहारोपपत्तिरिति शिष्टं द्वितीये।

8. Nor can it be argued that, although there is (here) no god in the primary sense, still let such property be 'god-property' by usage. Well, be it so; but there cannot be the relation of property and proprietor, and the use of (the term) 'property' (as god's) must be reconciled in the manner stated above. The rest (is to be found) in the second.

The concluding reference is to the commentary of Medhātithi himself on the second book of the Institutes of Manu, where he observes as follows on verse 189:

एवं देवस्वं देवपशवो देवद्रव्यमित्यादयो व्यवहारास्तादर्थ्येनोपकल्पितेषु पश्वादिषु द्रष्टव्याः। दण्डाधिकारे तु प्रतिकृतिविषयमेव देवताव्यवहारमिच्छन्ति। अन्यथा व्यवस्थाभङ्गः स्यात्। कल्पितदेवतारूपाणां प्रतिकृतीनां कल्पितेनैव स्वस्वामिभावेन तत्सम्बन्धिदेवब्राह्मणराज्ञां तु द्रव्यं

विज्ञेयमुत्तममित्यादिषु देवद्रव्यम्। नहि देवतानां स्वस्वामिभावोऽस्ति। मुख्यार्थासम्भवाद् गौण एवार्थो ग्राह्यः।

"It should be noticed that such expressions as 'property of the gods,' 'animals of the gods,' 'thing of the gods,' etc., mean animals, etc., supposed to be intended for the gods. In the context of Punishment, the term 'god' is desired to be used in the sense of image only; otherwise there would be a breakdown of the established order. (The expression) 'thing of the gods' in (texts) relating to them, such as "Things of the gods, Brāhmaṇas, and Kings are, however, to be regarded as belonging to the highest (class)," etc., (is) only (possible) through an imaginary relation of property and proprietor in the images, themselves imagined to have the forms of gods. For the gods have no relation of property and proprietor, and, as the primary sense is inadmissible (here), the secondary sense alone should be accepted."

No gift to gods allowed in Hindu Law.

It is conclusively established from these authorities that, according to strict Hindu juridical notions, there can be no gift in favour of the gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being

to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgācārya, however, in his commentary on the following passage of the Nirukta, seems inclined to adopt the view that, as the gods were originally physical objects deified, they could not very well be regarded as sentient beings, capable of acceptance of gifts in the strict sense of the terms :

अथाकारचिन्तनं देवतानाम्। पुरुषविधाः स्युरित्येकम्। चेतनावद्दृद्धि स्तुतयो भवन्ति तथाभिधानानि। अथापि पौरुषविधिकैरङ्गैः संस्तूयन्ते। ऋष्वा त इन्द्र स्थविरस्य बाह्व। यत् संगृभ्णा मघवन् काशिरित्ते। अथापि पौरुषविधिकैर्द्रव्यसंयोगैः। आ द्वाभ्यां हरिभ्यामिन्द्र याहि। कल्याणीर्जाया सुरणं गृहे ते। अथापि पौरुषविधिकैः कर्म्मभिः। अद्रीन्द्र पिब च प्रस्थितस्य। आशुत्कर्ण श्रुधी हवम्। अपुरुषविधाः स्युरित्यपरम्। अपि तु यद् दृश्यतेऽपुरुषविधं तद्यथाग्निर्वायुरादित्यः पृथिवी चन्द्रमा इति यथो एतच्चेतनावद्दृद्धि स्तुतयो भवन्तीत्यचेतनान्यप्येवं स्तूयन्ते यथाचप्रभृतीन्योषधिपर्य्यन्तानि। यथो एतत् पौरुषविधिकैरङ्गैः संस्तूयन्त इत्यचेतनेष्वप्येतद्भवति। अभिक्रन्दन्ति हरितेभिरासभिरिति ग्रावस्तुतिः। यथो एतत् पौरुषविधिकैर्द्रव्यसंयोगैरित्येतदपि तादृग्यमेव। सुखं रथं युयुजे सिन्धुरश्विनमिति नदीस्तुतिः। यथो एतत् पौरुषविधिकैः कर्म्मभिरित्येतदपि तादृग्यमेव। होतुश्चित् पूर्व्वे हविरद्यमाशतेति ग्रावस्तुतिरेव।

The following version will give a fairly accurate idea of the passage, which deals with the subject of the anthropomorphic and physical conceptions of the gods :

Anthropomorphic conception.

"One conception of the shape of the gods is that (they are) like human beings, inasmuch as the praises (of the gods) speak of them like conscious beings. So are their designations. They are also praised with man-like limbs. Ṛgveda, 4, 7, 31, 3: 'Oh Indra! Thou art bulky in thy graceful arms.' Ṛgveda, 3, 2, 1, 5: 'Oh Maghavan! As thou joinest together the two worlds (earth and heaven), large as thy fist.' (They are praised also) as possessed of things used by men. Ṛgveda, 2, 6, 21, 4: 'Come Indra, with a pair of horses.' Ṛgveda, 3, 3, 20, 6: 'In thy house is an auspicious wife.' They are praised also with acts of human beings. Ṛgveda, 8, 6, 21, 7: 'Eat, oh Indra, and drink of (these) lying before.' Ṛgveda, 1, 1, 20, 9: 'Oh Indra, having ears hearing all round, listen to our invocation.' The other (conception of the shapes of the gods) is found to be that (the gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Ṛgveda, 8, 4, 29, 2: 'These stones, used for pressing out (soma-juice), with their green mouths are crying

after (the gods).' As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Ṛgveda, 8, 3, 7, 4: 'The Sindhu river joined a comfortable chariot furnished with horses.' As this is a praise of the river, so is the (following) nothing but a praise of stones by attributing to them actions like those of human beings. Ṛgveda, 8, 4, 29, 2: 'Let the stones eat clarified butter, fit for eating, before the invoker of the gods (Agni).'''

The same view is supported by Ṛgveda, 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the king is the custodian of all such property. This is sufficiently indicated by the following passages: Vijñāneśvara in the Mitākṣarā (Vyavahārādhyāya, verse 186) lays it down that one of the duties of the king is the protection of the *devagṛha*, and Aparāditya and Mitra Miśra, in their commentaries on the same subject, lay down the rule in the same manner. In the Śukranīti, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of kings. The true Hindu conception of

dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the king, as the ultimate protector of the state, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but for the dedication religious merit and spiritual benefit accrue to the founder, and material benefit accrues to the person in charge of the worship and to the creatures of God.

The deity is not a complete juristic person.

This review, brief as it is, establishes the position, taken by Sir Asutosh Mookerjee and others in the Full Bench decision already referred to (*Bhupati* v. *Ramlal*, 10 C. L. J. 305), that the juridical construct, applicable to a corporation sole, cannot apply to a deity in Hindu law. A deity is not a complete juristic person. The attempt at making an idol a plaintiff or a defendant in a law-suit is based on a wrong notion of juristic personality. Personality, as has been put by Hölder, is "a hat, that the peg called person supports." If the peg is imaginary, surely, it cannot support a real hat. The deity, despite his spiritual potency, is juridically impotent. Religious endowments can be assimilated to purpose-trusts; the idol is there, for religion demands its presence. But the law courts "will none of it."